

THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WADE K. MARLER, DDS, *et al.*,

Plaintiffs,

v.

ASPEN AMERICAN INSURANCE
COMPANY,

Defendant.

No. 2:20-cv-00616-BJR

**PLAINTIFFS' MOTION TO CERTIFY
QUESTIONS TO THE WASHINGTON
STATE SUPREME COURT**

ORAL ARGUMENT REQUESTED

KARA MCCULLOCH DMD MSD PLLC, *et al.*,

Plaintiffs,

v.

VALLEY FORGE INSURANCE
COMPANY, *et al.*,

Defendants.

No. 2:20-cv-00809-BJR

CABALLERO,

Plaintiff,

v.

MASSACHUSETTS BAY INSURANCE
COMPANY,

Defendant.

No. 3:20-cv-05437-BJR

PLS.' MOTION TO CERTIFY QUESTIONS

(Case Nos. 2:20-cv-00616-BJR; 2:20-cv-00809-BJR; 3:20-cv-05437-BJR; 2:20-cv-00627-BJR; 2:20-cv-00620-BJR; 2:20-cv-00597-BJR; 2:20-cv-01176-BJR; 2:20-cv-00661-BJR)- 1

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CHORAK, *et al.*,

Plaintiffs,

v.

HARTFORD CASUALTY INSURANCE
COMPANY, *et al.*,

Defendants.

No. 2:20-cv-00627-BJR

PACIFIC ENDODONTICS, P.S., *et al.*,

Plaintiffs,

v.

OHIO CASUALTY INSURANCE
COMPANY, *et al.*,

Defendants.

No. 2:20-cv-00620-BJR

NGUYEN, *et al.*,

Plaintiffs,

v.

TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA, *et al.*,

Defendants.

No. 2:20-cv-00597-BJR

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LA COCINA DE OAXACA LLC,

Plaintiff,

v.

TRI-STATE INSURANCE COMPANY OF
MINNESOTA,

Defendant.

No. 2:20-cv-01176-BJR

MARK GERMACK DDS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

THE DENTISTS INSURANCE COMPANY,

Defendant.

No. 2:20-cv-00661-BJR

**PLAINTIFFS' MOTION TO CERTIFY QUESTIONS
TO THE WASHINGTON STATE SUPREME COURT**

In the Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss ("Omnibus Opposition") filed February 12, 2020,¹ Plaintiffs note this Court's discretion to certify questions of state law to the Washington Supreme Court when the questions are not "clearly determined" under existing law, and doing so would "save time, energy, and resources and help[] build a cooperative judicial federalism." *Durant v. State Farm Mut. Auto. Ins. Co.*, No. C15-1710 RAJ,

¹ In addition to the actions consolidated for omnibus briefing, this Motion is further made in one action not consolidated in the omnibus briefing, *Mark Germack DDS v. Dentists Ins. Co.*, No. 2:20-cv-0661-BJR (W.D. Wash.).

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1 2017 WL 2930512, at *2 (W.D. Wash. July 10, 2017) (alteration in original) (quoting *Lehman*
 2 *Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

3 There is a robust history in this District and Circuit of certifying important questions of
 4 state insurance law. *See Peoples v. United Servs. Auto. Ass’n*, 194 Wn.2d 771, 774, 452 P.3d
 5 1218 (2019) (certification from this District regarding application of Washington Consumer
 6 Protection Act to insurance claim denials); *T-Mobile USA Inc. v. Selective Ins. Co. of Am.*, 194
 7 Wn.2d 413, 416, 450 P.3d 150 (2019) (certification from the Ninth Circuit regarding whether an
 8 insurance company is bound by its agent’s written representation); *Durant v. State Farm Mut.*
 9 *Auto. Ins. Co.*, 191 Wn.2d 1, 5, 419 P.3d 400 (2018) (certification from this District regarding
 10 insurer’s compliance with regulations on automobile coverages); *Ohio Sec. Ins. Co. v. Axis Ins.*
 11 *Co.*, 190 Wn.2d 348, 349, 413 P.3d 1028 (2018) (certification from this District regarding
 12 service of process on insurers).
 13
 14

15 Moreover, this tradition of looking to the Washington Supreme Court includes certifying
 16 questions on the meaning ascribed to terms in insurance policies under Washington law—the
 17 core of the issues now before this Court. In *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d
 18 869, 873, 784 P.2d 507 (1990), the Hon. William H. Dwyer certified the question of whether
 19 environmental response costs constitute “damages” within the meaning of liability policies, and
 20 the resulting opinion from the Washington Supreme Court created a hallmark opinion for
 21 deciding policy interpretation issues in the state of Washington. *See also Queen Anne Park*
 22 *Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 487, 352 P.3d 790 (2015)
 23 (certification from the Ninth Circuit on the meaning of “collapse” under Washington law in an
 24 insurance policy); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 571, 964 P.2d 1173 (1998)
 25

26 PLS.’ MOTION TO CERTIFY QUESTIONS

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(certification from this District regarding the scope of coverage for “personal injury” under liability insurance policies);

Plaintiffs will not repeat the discussion from their Omnibus Opposition addressing the current state of Washington law on the key coverage questions presented in these actions. Two circumstances developed over the course of their preparation of the Omnibus Opposition which informed their ultimate conclusion to seek certification.

First, two federal trial courts in Ohio have certified COVID-19 coverage cases for immediate review. In *Neuro-Communication Services, Inc. et al. v. The Cincinnati Insurance Co. et al.*, No. 4:20-cv-01275 (N.D. Ohio), the court certified similar coverage questions to the Ohio Supreme Court, noting the importance to the public of the state-law insurance issues. *See* Order of Certification to the Supreme Court of Ohio, *Neuro-Comm’n Servs.*, No. 4:20-cv-01275 (N.D. Ohio Jan. 19, 2021), Dkt. # 43 (attached as Exhibit 1 to the Declaration of Ian Birk in Support of Plaintiffs’ Motion to Certify Questions to the Washington Supreme Court (“Birk Declaration”), filed herewith).

At the same time, in *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, No. 1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021), the court granted summary judgment to the policyholders finding coverage for a COVID-19 shutdown under a policy covering “direct physical loss,” ruling that, “Plaintiffs have shown that the state orders leading to the restaurants’ closings were caused by a fortuitous event. As argued by Plaintiffs, no one could have anticipated that state governments would issue orders shutting down or greatly restricting Plaintiffs’ restaurants – this was an ‘occurrence of chance.’” *Id.* at *13. The court certified its ruling for immediate appeal under 28 U.S.C. § 1292(b). This was

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1 because the coverage claim “involve[d] a controlling question of law as to which there is
 2 substantial ground for difference of opinion” and that “an immediate appeal of the legal issues in
 3 this case would accelerate the final disposition of this case and, if affirmed, provide the most
 4 expedient path to the economic relief sought by Plaintiffs.” *Id.* at *17. Certification to the state
 5 court of last resort would be a more direct means of obtaining a binding answer on state law.

7 Second, exemplifying the above point, in the briefs submitted to the Ninth Circuit in the
 8 appeal of the dismissal order in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, ---
 9 F. Supp. 3d ----, No. 20-CV-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020), the
 10 policyholder has sought certification to the California Supreme Court and the insurer has
 11 opposed this relief. *Id.* at *1. Appearing as an *amicus curiae*, the American Association for
 12 Justice has supported certification. Copies of the appellate briefs and the *amicus curiae* brief,
 13 which were filed in January and February 2021, are attached as Exhibits 2–4 to the Birk
 14 Declaration. The *Mudpie* case exemplifies the fact that the Ninth Circuit, no less than this Court,
 15 is bound by controlling decisions of the Washington Supreme Court on Washington law.
 16 Accordingly, the desirousness of finality articulated by the *Henderson Road* court in certifying
 17 the coverage issue for immediate appeal under 28 U.S.C. § 1292(b) would be best served by
 18 certification to the Washington Supreme Court under RCW 2.60.020.

20 Therefore, by this Motion, Plaintiffs:

21 (1) certify that they have conferred with counsel for the Defendant insurers on the
 22 substantive issue presented in this Motion, without agreed resolution;² and
 23
 24

25 ² In addition to conferring in the above-captioned actions, counsel have conferred in the recently filed action entitled
 26 *Cadecus LLC d/b/a Cafe Racer v. Scottsdale Insurance Co.*, No. 2:21-cv-00050-BJR (W.D. Wash.). Counsel will
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(2) move that the Court certify to the Washington Supreme Court the following questions of state law:

(a) Does being physically deprived of the ability to use covered property directly as a result of the Governor's shut-down orders constitute a "direct physical loss of" such property?

(b) Does Washington's efficient proximate cause rule require a factual determination of the predominant cause of an individual business's loss, before a virus (or other) exclusion may be applied to bar coverage?

DATED this 18th day of February, 2021.

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further address whether to bring a certification motion in that action once the insurer has responded to the complaint.

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